UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff | ) | |
| | ) | |
| v. | ) | Civil No. 03-97-B-W |
| | ) | |
| GARY K. CYR, et al., | ) | |
| | ) | |
| Defendants | ) | |

**RECOMMENDED DECISION ON MOTIONS FOR DEFAULT JUDGMENT AND FOR SUMMARY JUDGMENT**

The United States has filed this action seeking to foreclose on property owned by Gary Cyr and Robertine Cyr which is security for notes and mortgages the Cyrs executed with the United States Department of Rural Development. (Docket No. 1.) The Cyrs are now divorced and the real estate securing their obligations to Rural Development has been divided: Gary has received a portion identified as the farm property and Robertine has received a portion identified as the residential property. Before me now is a motion for default judgment as to all defendants but Robertine (Docket No. 15) and, vis-à-vis the United States and Robertine, cross motions for summary judgment (Docket Nos. 16 & 22).

I now recommend that the Court **GRANT** the unopposed motion for default judgment, these defendants having taken no part in these proceedings and the United States having followed all the requisite steps to obtaining the default judgment. The summary judgment dispute hinges not on the Cyrs' deficiency on the notes or the United

States' right to foreclose but on Robertine's assertion that she is entitled to the homestead protection described in 7 C.F.R. § 1951.911 and the United States' counter assertion that she cannot assert this entitlement unless both parcels, Gary's farm and Robertine's residential parcel, are conveyed back to the United States. Because I conclude that Robertine's argument concerning her entitlement to the homestead exemption is, in fact if not in form, a counterclaim to the United States' foreclosure action and because I conclude that Robertine has not exhausted her Administrative Procedure Act remedies for challenging the denial of her homestead exemption, I recommend that the Court **GRANT** the United States' motion for summary judgment and **DENY** Robertine's motion for summary judgment.

***Motion for Default Judgment***

In its motion for default the United States moves pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure to enter judgment by default against Gary K. Cyr, the Trustee of the Mitchell L. Cyr Irrevocable Trust, and the Maine Department of Human Services. (Docket No. 15.) It states that the amount due the United States, Farm Service Agency on the notes secured by the mortgages should be adjudged as follows: Principal and advances of $306,752.55 and interest through February 5, 2003, of $ 95,617.57, for a total of $402,370.12. It wants interest after February 5, 2003, to be computed at the per diem rate of $41.7187 to the date of judgment and costs, plus interest from the date of judgment at the legal rate until paid in full, plus costs to be taxed. In addition, the amount due to the United States, Rural Development on its note secured by the mortgage should be adjudged as follows: Principal and advances of $ 15,584.75, and interest through February 5, 2003, of $ 3,465.75, for a total of $ 19,050.50. It also seeks interest

after February 5, 2003, at the per diem rate of $3.2178 to the date of judgment and costs, plus interest from the date of judgment at the legal rate, until paid in full, plus costs to be taxed.

The United States wants Gary K. Cyr, the Trustee of the Mitchell L. Cyr Irrevocable Trust, and the Maine Department of Human Services to be forever barred of all right, claim, and equity of redemption in the mortgaged premises and personal property. It wants a decree that the premises and personal property be exposed to sale for the purpose of satisfying the plaintiff's judgment and requiring that the plaintiff be paid the amounts adjudged due the plaintiff with interest at the legal rate until the time of such payment, together with costs of this action and the expenses of the sale so far as the amount of such money applicable thereto will pay the same.

These defendants have not filed an answer or in other ways entered an appearance in this action. Compare United States v. $23,000 in U.S. Currency, 356 F.3d 157, 163-64 (1st Cir. 2004). The United States moved for entry of default on October 20, 2003, (Docket No. 10) and the Clerk entered default (Docket No. 11). No response has been received by these defendants.

With respect to the United States' computation of amounts due, these defendants have given up the right to contest liability when they declined to participate in the judicial process. In re The Home Restaurants, Inc., 285 F.3d 111, 114 (C.A.1,2002) (citing Franco v. Selective Ins. Co., 184 F.3d 4, 9 n. 3 (1st Cir.1999) and Brockton Savings Bank v. Peat, Marwick, Mitchell & Co., 771 F.2d 5, 13 (1st Cir.1985)); Franco v. Selective Ins. Co., 184 F.3d 4, 9 n. 3 (1st Cir.1999) ("A party who defaults is taken to have conceded the truth of the factual allegations in the complaint as establishing the grounds for

liability."). I have reviewed the complaint and the affidavits in support of this motion, and concluded that this is not a case in which a hearing is required to set damages as I cannot identify uncertainty about the amounts at issue. In re The Home Restaurants, Inc., 285 F.3d at 114. Accordingly, I recommend that the Court grant the motion for default judgment and enter an order in conformity with the United States' request.

***Cross Motions for Summary Judgment***

Summary judgment is granted to a party only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [that party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would "affect the outcome of the suit under the governing law," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," id. As there is a single issue here that is the subject of the cross-motions for summary judgment, I must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. Continental Grain Co. v. Puerto Rico Maritime Shipping Auth., 972 F.2d 426, 429 (1st Cir. 1992). If there is a genuine issue of material fact, both motions fail, and, if not, one party is entitled to judgment as a matter of law. 10A Wright, Miller & Kane § 2720, at 24-25.

***Undisputed Material Facts***

On December 6, 1977, Gary K. Cyr and Robertine T. Cyr executed and delivered to the United States, Rural Development a Promissory Note in the original

principal amount of $22,000. (Pl.'s SMF ¶ 1.) Subsequently, there were many more notes and mortgages, involving reamortization, consolidation, and rescheduling. (Id. ¶¶ 2-9.) The Cyrs also executed a series of Security Agreements with the United States, with the first one being April 27, 1981, to further secure the repayment of the above indebtedness and granting to the United States a security interest in defendants' livestock, crops and equipment. (Id. ¶¶ 10-11.)

As of February 5, 2003, there is due and owing from Gary Cyr and Robertine Cyr, on these Notes secured by said Mortgages and Security Agreements to the United States, Farm Service Agency, the total principal amount of $306,752.55, together with accrued interest in the amount of $95,617.57, for a total of $402,370.12, plus per diem interest after February 5, 2003, of $41.7187, plus costs of collection, including other amounts which may become due under these notes. (Id. ¶ 12.) As of February 5, 2003, the Cyrs also owe on the Rural Development Note and Mortgage the total principal amount of $15,584.75, together with accrued interest in the amount of $3,465.75, for a total of $19,050.50, plus per diem interest after February 5, 2003, of $3.2178, plus costs of collection, including other amounts which may become due under said Notes. (Id. ¶ 13.) The United States has complied with all servicing actions required under the regulations. (Id. ¶ 14.)[1]

Robertine Cyr was divorced from Gary Cyr by Divorce Judgment of Maine District Court dated August 24, 1998. (Def. Robertine Cyr's ASMF ¶ 15.) Pursuant to that divorce judgment, Robertine has since been the sole owner of the "Gary K. Cyr and Robertine T. Cyr Residence and Lot." (Id. ¶ 16.) On January 20, 1999, Robertine

[1] Robertine's only denial of the facts asserted by the United States pertains to this fact. However, her denial is that they did not comply with the servicing regulations because they did not allow her the homestead protection.

requested homestead protection from Farm Services Agency. (Id. ¶ 17.) On May 12, 1999, the United States accelerated the loan regarding Robertine's residence. (Id. ¶ 18.) Robertine appealed the acceleration on June 4, 1999. (Id.¶ 19.) On June 25, 1999, the FSA advised Robertine that they would not consider her for homestead protection unless her ex-husband also conveyed the farm real estate set apart to him. (Id. ¶ 20.) On July 1, 1999, however, Rural Development withdrew its decision to accelerate and stopped the foreclosure action. (Id. ¶ 21.)

On February 23, 2000, Rural Housing once again advised Robertine it was accelerating the housing loan. (Id. ¶ 22.) On March 6, 2000, Robertine requested informal discussion with Rural Housing. (Id. ¶ 23.) On July 18, 2000, Robertine again requested the homestead protection and the opportunity to purchase her residence. (Id. ¶ 24.) The FSA indicated that it would not consider Robertine's request unless her ex-husband Gary conveyed the farm real estate and machinery. (Id. ¶ 25.) On February 26, 2001, the FSA accelerated all debts. (Id. ¶ 26.) On March 6, 2001, Robertine again requested homestead protection rights for her residence. (Id. ¶ 27.) On March 25, 2001, the FSA refused Robertine homestead protection of her residence unless her ex-husband Gary conveyed the farm real estate and machinery. (Id. ¶ 28.) On July 27, 2001, Robertine, once again advised the FSA that she could only convey the residence. (Id. ¶ 29.) On August 22, 2001, the FSA demanded that Robertine liquidate the farm equipment. (Id. ¶ 30.) Robertine, on August 27, 2001, advised the FSA that she could not liquidate the farm equipment as it is all owned by Gary. (Id. ¶ 31.) On August 23, 2001, the FSA again told Robertine that the homestead protection was not available unless both residence and farm security is conveyed. (Id. ¶ 32.) Robertine, on August

27, 2001, advised the FSA that she was insisting on her homestead protection rights. (Id. ¶ 33.) On March 29, 2002, Robertine again requested homestead protection from the FSA, (id. ¶ 34) and the FSA, again, on April 2, 2002, insisted on the conveyance of both residence and farm real estate and equipment (id. ¶ 35). Robertine has consistently requested the right to convey and purchase her residence real estate (id. ¶ 36) and the FSA has consistently denied Robertine her homestead protection (id. ¶ 37).

***Discussion of the Homestead Protection Claim***

Section 1951.911 of title 7 of the Code of Federal Regulations sets forth the regulatory schematics of homestead protection. Robertine has framed her homestead protection entitlement argument as an affirmative defense in her answer to her complaint. (Answer at 5 ¶ 1.) She pleads: "Plaintiff is barred from bringing this foreclosure action against Defendant with regards to the premises described as the "Gary K. Cyr and Robertine T. Cyr. Residence lot" in Paragraph 12 of Plaintiff's complaint because Plaintiff has failed to comply with Defendant's request for Homestead Protection pursuant to 7 C.F.R. ch XVIII Section 1951.911." (Id.) With respect to the United States argument that Robertine did not exhaust her administrative remedies as required by 7 U.S.C. § 6912(e), Robertine states that she clearly requested the homestead exemption when she received notice of the first loan acceleration on May 12, 1999. (Docket No. 24 Ex. 2).

It is true that, vis-à-vis this first acceleration, Robertine asserted her entitlement and requested an appeal. (Id. Exs. 1, 3 & 4.) It is also true that the United States withdrew its adverse action at this juncture as indicated in a July 1, 1999, letter to

Robertine. (Id. Ex. 5) "At this point," Robertine now argues, "no further administrative remedy was required." (Def.'s Reply at 3.)

However, the material facts recited above do not establish a dispute concerning the fact that Robertine never completed administrative exhaustion of her homestead protection claim after the second acceleration. The record evidence provided by Robertine also demonstrates this. On February 23, 2000, Robertine received yet another letter formally informing her of the acceleration of the Farmers Home Administration note and laying forth her rights for discussion and right to an administrative appeal hearing. (Docket No. 24 Ex. 6.) On March 6, 2000, Robertine's attorney requested informal discussions (id. Ex.7) and followed-up with a July 18, 2000, letter requesting "that Robertine be provided the homestead protection rights available to her." (Id. Ex. 8.) The FSA loan manager responded that Gary and Robertine would each have to offer to convey all the real estate and machinery security for the entire indebtedness in order for homestead processing to proceed. (Id. Ex. 9.) Robertine then received a February 26, 2001, notice of acceleration and demand for payment of all amounts owing on the various mortgages. (Id. Ex. 10.)

On March 6, 2001, Robertine's attorney wrote to the FSA District Director indicating that it was not possible for Gary and Robertine to act together as required and asking if there was any regulation that prohibited providing the exemption to Robertine vis-à-vis the dwelling. (Id. Ex. 11.) In response the Farm Loan Chief wrote a March 23, 2001, letter indicating that the agency did not know of a regulation that would prohibit the FSA from providing the notice of availability of homestead protection to each borrower (even though they were now unmarried) after the FSA received title to the

property from both Gary and Robertine. (Id. Ex. 12.) In reply, Robertine's attorney sent a July 27, 2001, letter indicating that Robertine only had title to the residence parcel and could only voluntarily convey it. (Id. Ex. 13.) On August 22, 2001, the FSA loan manager requested voluntary liquidation of all collateral (id. Ex. 14) and, on the next day, a letter from the Farm Loan Chief indicated that all security would need to be conveyed, not just Robertine's (id. Ex. 17). An August 21, 2001, letter from Robertine's counsel stated that she did not agree with the FSA's interpretation of the homestead exemption and that she did not believe that the plain meaning or policy requires a borrower to convey property she did not own. (Id. Ex. 15.) This letter also closed with the statement that if the issue was not resolved before foreclosure the agency could be assured that it would be the focus of Robertine's defense of any foreclosure action. (Id.)

The next record evidence concerning these discussions is a March 29, 2002, letter from Robertine's attorney indicating that, in his view, the intervening bankruptcy of Gary Cyr had removed the obstacle to Robertine's exercise of her homestead protection right. (Id. Ex. 18.) And, finally, there is an April 2, 2002, letter from the Farm Loan Chief sticking to the position that all the property securing the Cyr obligation had to be conveyed, irrespective of Gary's bankruptcy, in order for the agency to take action on the homestead protection request by Robertine. (Id. Ex. 19.)

With respect to appeals of administrative determinations within the Department of Agriculture, 7 U.S.C. § 1912(e) provides that:

> Notwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against—
>
> **(1)** the Secretary;
>
> **(2)** the Department; or

**(3)** an agency, office, officer, or employee of the Department.

7 U.S.C. § 6912. This is the kind of direct and explicit statutory language that establishes a mandatory administrative exhaustion requirement as a prerequisite to bringing a suit. See Gleichman v. United States Dep't of Agric., 896 F.Supp. 42, 43-44 (D. Me. 1995); accord Bastek v. Fed. Crop Ins. Corp., 145 F.3d 90, 94-95 (2d. Cir.1998).

Section 1951.904 of title 7 of the Code of Federal Regulations sets forth procedures for seeking review of the FSA loan servicing officials' decisions that adversely affect a participant. See also 7 C.F.R. § 780 et seq.; Flint v. United States Dep't Agric., 39 F.Supp. 2d 418, 421-22 (D. Vt. 1997) (describing the administrative appeal process undertaken by plaintiffs challenging a FSA homestead protection denial). What is more, three letters sent to Robertine over the course of the two accelerations set forth her right to mediation and her right to request a hearing with the National Appeals Division. This appears to be a step that Robertine actually took vis-à-vis the first acceleration process as an appeal was pending at the time that the United States notified her that it had withdrawn its adverse decision and was stopping the foreclosure action. However, there was never a final determination on that appeal, and when the whole acceleration process started anew, at square one, Robertine began once again to assert her right to homestead protection but she never followed through with exhaustion of her administrative remedies.

"Statutory exhaustion requirements are mandatory, and courts are not free to dispense with them." Bastek, 145 F.3d at 94. The twist in this case is that this is an action brought by the United States to foreclose on the Cyr property and not an action brought by Robertine challenging the administrative denial of her homestead protection.

However, Robertine cannot circumvent the exhaustion requirement by sitting back, allowing the opportunity for timely administrative appeal to lapse, and waiting for the United States to institute a foreclosure action.

Boiled down, Robertine is not contesting the United States' entitlement to foreclose. Her assertion of her right to homestead protection is not an affirmative defense to the foreclosure but is, rather, a counterclaim. United States v. Bisson, 646 F. Supp. 701 (D.S.D. 1986) addressed just this type of exhaustion problem in an action brought by the United States and concluded that the defendant was not entitled to challenge a recovering action on a farm storage loan by asserting an unexhausted affirmative defense/counterclaim that his mortgaged corn had been stolen. The Court reflected:

> The purposes of the exhaustion doctrine would best be served by requiring Bisson to take all of the appeals provided by the agency. To do otherwise would 'encourage people to ignore' the appeal process set up by the agency. Andrade [v. Lauer], 729 F.2d [1475,] 1484 [(D.C. Cir. 1984)], and thus destroy its usefulness. Further, the need for judicial review might have been eliminated if the agency had been given all the opportunities available to "correct its own error," if any existed. Andrade, 729 F.2d at 1484. See Jordan v. United States, 522 F.2d 1128, 1131-32 (8th Cir.1975).

646 F.Supp. at 706 (footnote omitted). See also United States v. Royal Geropsychiatric Servs., Inc., 8 F.Supp.2d 690, 695- 96 (N.D. Ohio1998). In my view, Bisson is a persuasive model for resolving this dispute.

### *Conclusion*

For these reasons I recommend that the court **GRANT** the United States' motion for default judgment as to Gary K. Cyr, Trustee of the Mitchell L. Cyr Irrevocable Trust, and the Maine Department of Human Services. I also recommend that the Court

**GRANT** the United States' motion for summary judgment and **DENY** Robertine Cyr's motion for summary judgment.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated March 26, 2004

UNITED STATES OF AMERICA et al v. CYR et al
Assigned to: JUDGE JOHN A. WOODCOCK JR.
Referred to:
Demand: $
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 28:1345 Foreclosure

Date Filed: 06/03/03
Jury Demand: None
Nature of Suit: 220 Real Property: Foreclosure
Jurisdiction: U.S. Government Plaintiff

**Plaintiff**
---

**UNITED STATES OF AMERICA** represented by **FREDERICK EMERY**
OFFICE OF THE U.S. ATTORNEY
P.O. BOX 9718
PORTLAND, ME 04104-5018
(207) 780-3257
Email: frederick.emery@usdoj.gov
*LEAD ATTORNEY*
*ATTORNEY TO BE NOTICED*

V.

**Defaulted Party**
**----------**

**GARY K CYR**

**HUMAN SERVICES, MAINE DEPARTMENT OF**

**MITCHELL L CYR IRREVOCABLE TRUST, TRUSTEE OF**

**Defendant**
**----------**

**ROBERTINE T CYR** represented by **WILLIAM J. SMITH**
55 MAIN STREET
P.O. BOX 7
VAN BUREN, ME 04785
868-5248
Email: wjsmith@ainop.com
*LEAD ATTORNEY*
*ATTORNEY TO BE NOTICED*